IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 422

WILLIAM LINK,

Petitioner,

vs.

WABASH RAILROAD COMPANY,

Respondent.

N PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The Wabash Railroad Company respectfully prays that the Petition for Writ of Certiorari be denied, and submits herein matters and grounds why the cause should not be reviewed by this Court.

QUESTIONS PRESENTED.

Whether the trial court had, and properly exercised, power to dismiss the cause upon failure of plaintiff to appear through counsel at a pretrial conference set pursuant to notice under a local rule, where plaintiff's counsel

intentionally remained in another, distant city to complete unrelated out-of-court work on the scheduled date, and first advised the court of his intention not to appear at the scheduled time and place by telephone two and a quarter hours before the scheduled time.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

1. Respondent submits that no constitutional provisions or questions are involved or presented.

2. Rules 16, 41(b) and 83 of the *Federal Rules of Civil Procedure for the United States District Courts*, and Rule 12 of the *Rules of the United States District Court for the Northern District of Indiana, Effective March 1, 1960*, all set forth in the petition herein, are involved.

STATEMENT OF THE CASE.

Respondent submits the following, pursuant to Rule 40(3) of the Supreme Court of the United States, in order to correct what respondent believes are material errors and omissions in petitioner's argumentative "statement" of the case, and in order to furnish a correct and concise statement of the material facts:

This was a personal injury case arising out of plaintiff's collision with defendant's train at a public crossing. Upon a prior appeal, action of the District Court in dismissing the complaint for failure to state a claim was reversed. No question in petitioner's 1961 appeal was predicated upon the questions presented by the previous appeal.

Subsequent to the mandate upon the previous appeal, the case had been set for trial July 17, 1957; on June 27, 1957, on motion of the plaintiff, defendant not objecting, a continuance was entered. (R. 1a; also R. 3a, entries

headed "6-21-57" and "6-27-57.") On August 17, 1957, the defendant filed interrogatories addressed to the plaintiff, with certificate of service attached. (R. 2a, line 1, and R. 3a, entry headed "8-17-57.")

On February 24, 1959, the Court gave notice that the cause would be dismissed March 25, 1959, for failure to prosecute, pursuant to a local rule, unless otherwise ordered. On March 24, 1959, plaintiff filed answers to the 1957 set of interrogatories. After various intervening arguments, motions and briefs, the Court entered an order on June 4, 1959, retaining the case on the docket, and at the same time set the case for trial July 22, 1959. On July 2, 1959, at defendant's request, to which plaintiff agreed, the case was continued until further assignment. (R. 2a, and R. 3a-4a, entries headed "2-24-59" through "7-2-59.")

On March 11, 1960, the defendant filed further interrogatories addressed to plaintiff. After being granted an extension of time, plaintiff filed answers to these interrogatories, other than interrogatory 3, which was not completely answered. (R. 4a, entries headed "3-11-60" through "4-15-60"; R. 8a.)

On September 29, 1960, notice of a pre-trial conference to be held October 12, 1960, was sent out (R. 14a), and on October 12, 1960, upon failure of plaintiff's counsel to appear, the order of dismissal here involved was entered. (R. 4a, 9a and 16a.)

Thereafter, on November 10, 1960, plaintiff filed his notice of appeal. On November 28, 1960, at plaintiff's request, a conference was held with the trial court, but nothing was brought before the court by the plaintiff and the conference terminated. (R. pp. 4a-5a.)

The dismissal was affirmed on appeal, and as shown at p. 2 of petitioner's petition herein, certiorari was sought

on the ninetieth day following the Court of Appeal's denial of rehearing.

The events of October 12, 1960, on which date the dismissal was entered, are accurately summarized in the Court of Appeals' decision sustaining the dismissal (291 F. 2d at 544, 545; pp. 4a-5a of Appendix to Petition), as suggested at p. 9 of the Petition. Respondent of course does not accept the argumentative portions of Petitioner's "statement," interspersed throughout it and especially following its reference to the Court of Appeals' factual summary, as being in any way proper to a statement of facts.

ARGUMENT.

Introduction.

UNDER RULE 19 OF THE SUPREME COURT, THE RECORD AND PETITION ESTABLISH NO REASON FOR GRANTING CERTIORARI.

The decision of the Court of Appeals as to which petitioner herein seeks certiorari involved nothing more than *application of well-recognized and commonly applied rules of law as to a trial court's power and discretion in the involuntary dismissal of actions, to the particular factual situation of the case.* The decision accordingly presents no question of importance to persons other than the immediate parties to the particular action and respondent respectfully submits that under the tests laid down by Rule 19 of the Supreme Court of the United States, no reason exists for the granting of the petition for certiorari herein.

Nor does the petition herein establish any such basis for granting review. The petition seems to be based principally on the patently false contention that Rule 41(b) of the Federal Rules of Civil Procedure has taken away all powers of the district courts to dismiss cases of their own motion. A subsidiary contention of petitioner, adapted from the dissenting opinion in the Court of Appeals' decision herein, is that a lawyer's acts or omissions in prosecuting (or failing to prosecute) a lawsuit are not imputable to his client.

The authorities are to the contrary, as documented in succeeding portions of this brief. Respondent submits respectfully that the petition herein should be denied.

1.

DISREGARD OF THE PRETRIAL SETTING, WHICH RESULTED IN THE DISMISSAL, STANDS AGAINST A BACKGROUND OF PETITIONER'S GENERAL LACK OF DILIGENCE.

The tone and color of this case at the trial court level can at least be suggested by a review of the record herein. This record shows that plaintiff-petitioner never took any action whatever to advance this case, after its return to the trial court docket in March, 1957. It should be noted that the matters which petitioner declines to discuss at page 9 of the present petition ("Without listing all the succeeding proceedings * * *") dealt mostly with *proceedings on the court's own motion*, during the period February 24-June 4, 1959, *to dismiss this cause for plaintiff-petitioner's failure to take action for over one year.* (R. 2a, 3a-4a.) The case was retained on the docket, but plaintiff still never took any subsequent action, other than to belatedly answer further interrogatories. Hence when plaintiff-petitioner's counsel *deliberately stayed on in Indianapolis*, on the day set for the pretrial, on unrelated out-of-court work, and made no effort to notify the court of this deliberate action until slightly more than two hours before the time set for the pretrial in Hammond (the two cities being, as petitioner states at page 11, some 165 miles apart), the action of the trial court in then dismissing the action, for failure of plaintiff's counsel to comply with the pretrial setting, obviously was not a sanction imposed against a previously diligent party or counsel.

2.

THE PRETRIAL CONFERENCE IN QUESTION WAS DULY AUTHORIZED AND VALIDLY SCHEDULED.

It is undisputed that the pretrial conference in question was scheduled, and notice thereof was given, pursuant to valid rules and procedures of the trial court. The Court of Appeals, in its decision affirming the dismissal herein, summarized these threshold matters adequately at 291 F. (2d) 544 (App. 3a-4a).

3.

THE DISMISSAL BY THE TRIAL COURT, ON ITS OWN MOTION, WAS WITHIN ITS GENERAL OR INHERENT POWERS, AS RECOGNIZED BY RULE 83; THERE WAS NO NEED FOR A DEFENSE MOTION UNDER RULE 41(b).

Petitioner's basic contention apparently is that the trial court had no power to impose sanctions for the deliberate disregard of the pretrial setting, except upon motion made by the *defendant* under Rule 41(b). The Court of Appeals properly disposed of this theory in its decision in the instant case, as follows:

> "Plaintiff argues that there was no motion by defendant for dismissal. Since the trial court did not base its dismissal on Local Rule 11 (N. D.—pertaining to dismissal after delays of one year) or on Rule 41(b), Federal Rules of Civil Procedure, for want of prosecution, no such motion was required. It is quite clear to us that district courts have ample authority to 'regulate their practice in any manner not inconsistent with' the Federal Rules of Civil Procedure, as provided in Rule 83 * * * This case comes within the purview of that rule." (291 F. (2d) at 545.)

In support of this position, see *Janousek* v. *French*, 287 F. (2d) 616 (8th Cir., 1961). There the action was dismissed upon plaintiff's failure to appear when the case

was reached on call of the trial calendar. Without formal motion by the defendant, the action was dismissed. The Eighth Circuit treated the failure to appear pursuant to peremptory call as being a failure to diligently prosecute, and in discussing Rule 41(b) stated:

> "Although the rule authorizes dismissal on motion of defendant, *it is a cardinal principle of law that the court may dismiss on its own motion*, for Rule 41(b) expressly recognizes and incorporates the inherent power of courts to dismiss actions for lack of diligence in bringing them to trial * * *" (287 F. 2d at 620; italics added.)

Otherwise expressed, Rule 41(b) makes it plain that a defendant may move the trial court to exercise these powers, if the trial court does not exercise them on its own initiative.

And, of course, Rule 41(b) carries within itself express recognition that there are other types of dismissals "not provided for in this rule * * *"

The power of a district court to exercise its inherent powers and enter dismissals in situations (such as the present) involving disregard of its orders, rules or settings is well documented in the opinion of the Court of Appeals herein, in 291 F. (2d) at 545-546. As stated by the Court of Appeals in this connection,

> "It is sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures and to impose appropriate sanctions for failure to comply. The authorities are all to the contrary." (291 F. 2d at 545.)

Petitioner has been unable to cite any authority in support of his position. It is abundantly clear that the trial court herein had clear and ample power to enter the dismissal, as it did, under its "inherent powers," and "upon

failure of plaintiff's counsel to appear" at the pretrial (R. 9a), without need for a defense motion under Rule 41(b).

(Petitioner has argued at p. 22 of his petition that the cases cited by the Court of Appeals, in its opinion affirming the dismissal herein, involved disobedience of rules and orders, and asserts that no disobedience of a "rule" or "order" was involved here. Apparently this assertion is based on the fact that the notice of the pretrial was called a "*notice*" and not an "*order.*" This thin semantic distinction has been adequately dealt with by the Court of Appeals herein:

> ("The 'notice' was sent pursuant to Local Rule 12 of the district court. Local Rule 12 had been promulgated by an order of the court. Certainly *a notice sent pursuant to an order of the court embodied in a court rule does and should have all the force and effect of an order of the court.* Further, plaintiff has not cited any authority requiring that a pre-trial conference be scheduled by a specific court order to give it validity. *It is well settled that court rules have the force of law.* *Weil* v. *Neary* 1929, 278 U. S. 160, 169, 49 S. Ct. 144, 73 L. Ed. 243." 291 F. (2d) 545; italics added.)

4.

SUMMARY DISMISSAL FOR DISREGARD OF PRETRIAL PROCEDURES IS A PROPER SANCTION; NOR DID IT FORECLOSE PETITIONER FROM BRINGING OTHER EXPLANATORY FACTS BEFORE THE TRIAL COURT IF ANY EXISTED.

The sanction of dismissal may be summarily imposed where there is a failure to comply with a scheduled date for a pretrial conference. Thus in *Wisdom* v. *Texas Co.*, 27 F. Supp. 992, where plaintiff's attorney had been notified of a pretrial conference, and failed to appear, the opinion shows that dismissal was entered forthwith. Like-

wise in *Dalrymple* v. *Pittsburgh Consolidation Coal Company*, 24 F. R. D. 260 (W. D. Pa. 1959), where plaintiff's attorney appeared at pretrial but was totally unprepared to proceed, dismissal was again entered on the pretrial date. And in *Blue Mountain Construction Company* v. *Werner*, 270 F. (2d) 305 (9th Cir., 1959), cert den. 361 U. S. 931, where plaintiff's counsel failed or refused to appear for a duly scheduled pretrial, the court dismissed the action with prejudice without further proceedings (although the formal judgment apparently was entered on a later day).

Dismissal without notice, on the court's own motion, in the analogous situation of failure to prosecute diligently, was held not to contravene "any sustainable concept of due process," in *Shotkin* v. *Westinghouse Electric & Mfg. Co.*, 169 F. (2d) 825, 826 (10th Cir., 1948).

Although petitioner's counsel complains that he was given no opportunity to explain his absence, it should be noted that *he had already stated his position by telephone before the scheduled hour for the pretrial; and, most significantly, he never took any steps to bring any additional facts before the trial court*, by motion for relief under Federal Rule 60(b) or otherwise. The record shows that plaintiff-petitioner's counsel obtained a conference with the trial court on November 28, 1960, but *brought no motion before the court*, and the conference terminated without anything having been presented "upon which the court might act." (R. 5a.) Obviously plaintiff's counsel *had no additional facts or excuses to present*.

5.

THE UNDISPUTED FACTS AFFIRMATIVELY SHOW LACK OF GOOD CAUSE FOR DISREGARD OF PRETRIAL RULE AND SETTING; HENCE TRIAL COURT WAS WITHIN ITS DISCRETIONARY POWERS IN DISMISSING CASE.

As stated by the Court of Appeals herein, the undisputed facts of record herein show that

> "With knowledge of the time and place of the pretrial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it * * *" (291 F. 2d at 546.)

As further stated by the Court of Appeals,

> "* * * this falls far short of being a legitimate excuse fo failing to appear in court at the time fixed." (291 F. 2d at 546.)

It is not an abuse of discretion for a court to dismiss an action even where plaintiff's failure to respond to a court rule was due to pressure of counsel's trial commitments in other courts:

> *Darlington* v. *Studebaker-Packard Corporation*, 261 F. (2d) 903, 905 (7th Cir., 1959), cert. den. 359 U. S. 992, 3 L. Ed. (2d) 980;
>
> *Rooney* v. *City of East Chicago et al.*, 129 Ind. App. 128; 148 N. E. (2d) 842, 844 (1958).

Petitioner's counsel, having participated in both of the above-cited cases, is certainly familiar with this rule.

To the same effect is *Ledwith* v. *Storkan*, 2 F. R. D. 539 (D. Neb., 1942), refusing relief under Rule 60(b) where the allegation was that defendant's attorney was engaged in other business, and was out of the jurisdiction of the court. The decision contains discussion of analogous cases from a number of other jurisdictions.

6.

RULE THAT "LACK OF ACTION ON THE PART OF COUNSEL IS THAT OF HIS CLIENT" ANSWERS OTHER ARGUMENTS OF PETITIONER, AND JUDGE SCHNACKENBURG'S DISSENT.

Petitioner, at page 17 of his petition, and Judge Schnackenburg in his dissent at 291 F. (2d) 547, state without citation of authority that the faults or omissions of a lawyer should not be imputed to his client. But the law clearly is to the contrary. The general principles are stated in 7 *C. J. S., Attorney and Client*, sec. 67, pp. 850-851, as follows:

> "The relation of attorney and client is one of agency, that is, the attorney is the agent of the client * * *. Thus, the *client is bound*, according to the ordinary rules of agency, by the acts of the attorney within the scope of the latter's authority. *In general, whatever is done in the progress of the cause by such attorney is considered as done by the party, and is binding on him* * * *"
>
> "In general, the *omissions*, as well as commissions, of an attorney are to be *regarded as the acts of the client whom he represents*, and *his neglect is equivalent to the neglect of the client himself.*" (Italics added.)

The attorney is regularly summoned to court for arguments, hearings, pretrials—not as an individual, but as the agent and representative of his client. The courts operate through attorneys, acting for their clients—and not just as messengers, but as representing and standing in the shoes of their clients.

The law of Indiana, if not controlling, is at least instructive as to locally-prevailing standards. The rule is strictly followed in Indiana that the acts and omissions of an attorney in litigation are those of the client: *Ferrara*

v. *Genduso*, 214 Ind. 99, 14 N. E. (2d) 580 (1938) (which also discusses a number of earlier Indiana cases applying this rule); *Mockford* v. *Iles*, 217 Ind. 137, 145, 26 N. E. (2d) 42 (1940); *Kuhn* v. *Indiana Ice & Fuel Company*, 104 Ind. App. 387, 11 N. E. (2d) 508 (1937).

Thus, as the Court of Appeals correctly stated in affirming the dismissal herein, "* * * the short answer * * * is that the action or lack of action on the part of counsel is that of his client." 291 F. (2d) at 546.

7.

PETITIONER'S AUTHORITIES FAIL TO SUSTAIN HIS POSITION OR TO ESTABLISH REASONS FOR REVIEW.

Petitioner has cited no authorities contrary to respondent's position herein. Of the few authorities cited by petitioner, he appears to rely most heavily on *Syracuse Broadcasting Corporation* v. *Newhouse*, 271 F. (2d) 910 (2d Cir., 1958), which he cites first for the proposition that "Rule 16 confers no special power of dismissal not otherwise contained in the rules." *In context* (271 F. 2d at 914), this statement was made immediately after the Court of Appeals' statement that the trial court had invoked Rule 16

> "* * * on the theory that dismissal at the pretrial stage is proper where it clearly appears that plaintiff *will be unable to prove the allegations of its complaint.*" (Italics added.)

The appellate opinion then properly pointed out that defendant's motion to dismiss on this ground should have been disposed of under the *summary judgment* procedure established by Rule 56. This in no way implies that a court cannot *impose sanctions for disregard of pretrial procedures;* in fact the decision goes on to *hold specifically that this would be proper*, but points out that under the particular facts the trial court did not regard plaintiff's

conduct "* * * as sufficiently contumacious in and of itself to justify dismissal * * *" (271 F. 2d at 914.) Thus this case is consistent with respondent's position herein.

In addition to the cases already cited (section 4, *supra*) in which failure to comply with pretrial procedures under Federal Rule 16 resulted in dismissal, see *Package Machinery Company* v. *Hayssen Manufacturing Company*, 164 F. Supp. 904, 909 (E. D. Wis., 1958), affirmed in 266 F. (2d) 56 (7th Cir., 1959).

Petitioner then quotes the *Syracuse Broadcasting* case again, with internal citation of two additional cases, for the general proposition that dismissal is a "drastic sanction." Suffice it to say that in both of the internally-cited cases (*Gill* v. *Stolow*, 240 F. 2d 669, 2d Cir., 1957, and *Producers Releasing Corp. de Cuba* v. *PRC Pictures*, 176 F. 2d 93, 2 Cir., 1949), *personal illness* of the defaulted parties was demonstrated, upon appeal.

The case of *Societe Internationale* (*etc.*) v. *Rogers*, 357 U. S. 197, 2 L. Ed. (2d) 1255, cited by petitioner on the same general subject, involved a situation where plaintiff made repeated good-faith efforts to comply with a production order, but was deterred by fear of foreign criminal prosecution if it complied—a far cry from the present situation.

These are all of the cases relied upon by petitioner. Neither these cases, nor the general *C. J. S.* quotations added by petitioner at pp. 20-21, establish any basis upon which certiorari could or should be granted herein.

The only case cited in Judge Schnackenburg's dissent (291 F. 2d at 547) is *Allegro* v. *Afton Village Corp.*, 9 N. J. 156, 87 A. (2d) 430, where, under a particular set of facts involving delay caused by confusion over obtaining new counsel, after withdrawal of plaintiff's original counsel, the majority of the court (Chief Justice Vander-

bilt dissenting) felt that dismissal was not reasonable under the circumstances. Thus there is no factual similarity to the instant case.

No abuse of discretion by the trial court in this case has been demonstrated, and under the facts here present, there was none.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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